No. 15-338

In the Supreme Court of the United States

MARK J. SHERIFF, *et al.*

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF NATIONAL CONSUMER LAW CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND PUBLIC GOOD LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

This brief, by three consumer-advocacy groups, addresses the second question presented: whether private debt collectors enlisted by Ohio's Attorney General as "collections special counsel" violated the Fair Debt Collection Practices Act by sending collection letters to Ohio consumers on Attorney General letterhead.[1]

If the Court reaches this question, it should decline the petitioners' invitation to create an extratextual "materiality" requirement. That issue is not implicated here: The letters constituted per se violations of two specific FDCPA prohibitions. Congress expressly concluded that this conduct "is a violation" of the FDCPA. 15 U.S.C. § 1692e. The Court therefore need not address whether materiality might be required in a different, hypothetical case.

The Court should also decline to entertain the petitioners' proposal to adopt an "average consumer" standard—an argument neither presented nor passed on below, nor even mentioned in the petition for certiorari. The petitioners give no content to their proposed standard, which has not been adopted by any court. Over the last three decades, the lower courts have consistently employed a "least-sophisticated consumer" standard in FDCPA cases. There is no reason for this Court to depart from that settled consensus now. Quite the contrary: Given the empirical evidence showing low financial-literacy levels among U.S. consumers, ensuring the continued use of the least-sophisticated-consumer standard is essential to vindicating the Act's purposes.

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[1] All parties consent to this brief, and no party's counsel authored it in whole or part. Apart from *amici*, no person contributed money to fund its preparation or submission.

INTEREST OF *AMICI CURIAE*

National Consumer Law Center (NCLC) is a nonprofit research and advocacy organization focusing on the legal needs of consumers—especially low-income and elderly consumers. For over 45 years, NCLC has been the consumer-law resource center to which state and federal consumer-protection officials, advocates, public policy makers, reporters, and community groups have turned for legal answers, policy analysis, and technical and legal support. NCLC is recognized nationally as an expert in fair-debt-collection issues and is the author of *Fair Debt Collection* (8th ed. 2014), a comprehensive treatise on which this Court has relied. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 591 n.12 (2010).

National Association of Consumer Advocates (NACA) is a nonprofit corporation whose members are lawyers, law professors, and students whose practice or area of study involves consumer protection. NACA's mission is to promote justice for consumers by maintaining a forum for information sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices. Compliance with the FDCPA has been a continuing focus of NACA since its inception.

Public Good Law Center is a public-interest organization dedicated to the proposition that all are equal before the law. Through *amicus* participation in cases of particular significance for consumer protection and civil rights, Public Good seeks to ensure that the law remains available to everyone. Public Good has been particularly involved in cases involving unfair debt-collection practices, including instances of deceptive use of the trappings of government agencies.

STATEMENT

Respondents Pamela Gillie and Hazel Meadows received similar debt-collection letters, which bore the State of Ohio's seal and represented that they were from the Office of the Ohio Attorney General. They were both "alarmed" by these letters; Meadows in particular was "scared that the Ohio Attorney General might charge [her] with a crime for not paying what he said [she] owed." JA 43–45, 139. But the letters had actually been sent by special counsel—private lawyers that the State of Ohio enlists to collect debts. *See* Pet. App. 22a–26a.

Gillie and Meadows brought a putative class action against the special counsel, alleging that their use of Attorney General letterhead violated specific prohibitions set forth in section 1692e of the FDCPA. In particular, they alleged that the letters violated the Act's prohibitions on "[t]he use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval," 15 U.S.C. § 1692e(9); and "[t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization," *id.* § 1692e(14).

Holding that they were not "debt collectors" under the FDCPA, the district court granted special counsel's motion for summary judgment. In the alternative, the court concluded that the letters did not violate section 1692e because "the least sophisticated consumer would not be materially misled." Pet. App. 96a.

The Sixth Circuit reversed on both grounds. With respect to liability under section 1692e, the Sixth Circuit (like the district court) asked whether "the least sophisticated consumer" would be confused by the letters. Pet.

App. 48a. Noting that "[t]he use of the letterhead has no apparent purpose beyond misleading a consumer into believing it is the Attorney General who is collecting on the account," the court held that "a jury could reasonably find that special counsel's use of the letterhead is confusing; and therefore a violation of § 1692e." Pet. App. 46a, 54a. The Sixth Circuit remanded the case for a jury trial.

ARGUMENT

I. Because the petitioners committed per se violations of the FDCPA, this Court need not address whether materiality may be required under different circumstances.

The respondents allege that special counsel's use of Attorney General letterhead violated two provisions of the FDCPA: section 1692e(9)'s prohibition against sending a communication that "simulates a document issued" by "any State" or "creates a false impression as to its source," and section 1692e(14)'s requirement that a communication use only "the true name of the debt collector's business." There is enough evidence in the record for a jury to agree. As the Sixth Circuit observed, "[t]here is no compelling reason for special counsel to use the [Attorney General] letterhead, other than to misrepresent their authority and place pressure on those individuals receiving the letters." Pet. App. 45a. And the petitioners themselves have all but conceded that the letters violate both subsections' plain terms. *See* Resp. Br. 40–47. That should be the end of the analysis: Under the FDCPA, a violation of either subsection constitutes "a violation of [section 1692e]." 15 U.S.C. § 1692e.

Eschewing this straightforward analysis, the petitioners ask the Court to write into the statute an additional requirement that is nowhere to be found in the text. To establish a section 1692e violation, they contend, it is not enough for plaintiffs to prove that the defendant

engaged in conduct that Congress said "is a violation of" the statute. *Id.* They must also prove that the communications were "materially misleading." Pet. Br. 39; *see also id.* at 43–44. The petitioners derive this asserted materiality requirement from section 1692e's general catch-all provision: that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. On their reading, the "false, deceptive, or misleading" language incorporates a background principle of materiality that extends to cover other provisions beyond the catch-all, including those that Congress deemed per se violations of the statute. Pet. Br. 39, 43.

This Court should reject that reading. For starters, it is doubtful that Congress intended to silently import into the FDCPA *any* common-law concept of materiality, even with respect to the catch-all provision. As this Court has cautioned, when a statute does not "so much as mention materiality"—as is the case with the FDCPA—"a natural reading of the full text" suggests that "materiality would not be an element." *United States v. Wells*, 519 U.S. 482, 490 (1997). Absent clear evidence to the contrary, this Court should refrain from injecting an extratextual materiality requirement into the statute. *See also* Resp. Br. 50–51.

In any event, whether Congress intended to cabin the general catch-all provision by an unexpressed materiality requirement is not at issue here. The respondents allege that special counsel violated the law's *specific* prohibitions set forth in subsections (9) and (14)—not the catch-all provision. And Congress expressly concluded that any conduct described in those subsections "is a violation of this section." 15 U.S.C. § 1692e. Congress did not mention materiality in either subsection, directly or indirectly, and the petitioners do not contend that it did.

Instead, they make an appeal to the congressional policies behind the Act, arguing (at 43) that "[a] materiality element furthers the Act's purposes" by protecting "conscientious debt collectors" from liability. But, by spelling out specific conduct as per se unlawful, Congress determined that this conduct—including the conduct specified in subsections (9) and (14)—is necessarily harmful to consumers. Put differently, debt collectors who engage in such practices are, in Congress's judgment, inherently *not* "conscientious."

The question here, then, is whether the allegedly unlawful conduct matches that proscribed by subsection (9) or (14). If so, the petitioners have violated the FDCPA. That is true irrespective of whether the Act's catch-all language is limited by a materiality requirement. So this Court need not—and therefore should not—decide the hypothetical question whether materiality would be required in a different case. It should instead hold that a per se violation is what Congress said it is: "a violation of this section." 15 U.S.C. § 1692e; *see Warren v. Sessoms & Rogers P.A.*, 676 F.3d 365, 374 (4th Cir. 2012) ("[W]hether a materiality requirement attaches to other violations of § 1692e has no impact on [the plaintiffs'] allegations that the defendants violated [a specific subsection of § 1692e]."), *abrogated on other grounds by Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016).

Contrary to the petitioners' claim, a plain-text reading would not allow the FDCPA to reach "any technical falsehood." Pet. Br. 44. Unlike the petitioners' proposed "materiality" requirement, the Act already contains an *express* limitation on liability, demanding that any representation be made "in connection with the collection of any debt." 15 U.S.C. § 1692e. Courts have held that this language restricts liability to those communications that have the "animating purpose" of "induc[ing] payment by the debtor" or that "aim[] to make a [debt-collection]

attempt more likely to succeed." *Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011). Given this language—and the specific language that Congress used in crafting the per se violations—there is simply no need for this Court, in this case, to judicially impose an extratextual limitation for policy reasons.

II. This Court should not entertain the petitioners' proposal to adopt a new "average consumer" test.

A. The petitioners not only seek the creation of a new materiality requirement, they also ask this Court to adopt a new liability standard for deceptive conduct under the Act—their so-called "average consumer" test. Pet. Br. 41. The Court should decline the request. The petitioners appear to have invented that test only after this Court granted certiorari. They did not mention it in their petition or reply brief, nor did they discuss it in their briefing below. And neither the panel opinion nor the dissent says anything about such a test.

Indeed, in seeking certiorari, the petitioners urged this Court to resolve an asserted "circuit split" that had (in their words) created "conflicting tests for assessing whether debtors would find a statement misleading: the 'least sophisticated consumer' test and the 'unsophisticated consumer' test." Pet. for Cert. 24; Reply 10. To induce this Court to grant review, the petitioners signaled that they were prepared to advocate for the second test, arguing that, under that test, the letters are not misleading. Pet. for Cert. 28.

Now that this Court has granted certiorari, the petitioners instead purport to advance a third test: "one asking whether an *average consumer*" in the relevant market would be misled. Pet. Br. 41. But the only case the petitioners cite to support their test does no such thing. Specifically, that case says that the standard focuses on "the average consumer *in the lowest quartile*

(or some other substantial *bottom fraction*) of consumer competence." *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 774 (7th Cir. 2007) (emphasis added). The standard, in other words, focuses on "consumers of below-average sophistication." *Clomon v. Jackson*, 988 F.2d 1314, 1319 (2d Cir. 1993). No circuit has held otherwise.

The petitioners do not flesh out the contours of their proposed test, but under any plausible iteration it should be rejected here. On the one hand, if the "average consumer" test sets a meaningfully higher bar than the tests argued below, the petitioners have waived the argument. "[T]his is a court of final review and not first view." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam). It "does not ordinarily decide questions that were not passed on below." *City & Cnty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1773 (2015); *see also United States v. Williams*, 504 U.S. 36, 41 (1992). Doing so in this case would be especially inappropriate because the precise liability standard is irrelevant: The respondents are not relying on the catch-all provision. And even if determining whether a letter "creates a false impression as to its source" (under subsection (9)) were to require the application of a liability standard, determining whether the debt collector used a "name other than [its] true name" (under subsection (14)) does not.

If, on the other hand, the petitioners' "average consumer" test is not meaningfully different from the standards argued below, then they are simply playing a "semantics game." Pet. for Cert. 27. Although they ask this Court to "reject" the least-sophisticated-consumer standard, complaining that it "misleads" and "lacks any historical pedigree," they do not identify what exactly is wrong with how the standard is applied by lower courts. Pet. Br. 42. To the contrary, they concede that the standard "reject[s] liability 'for bizarre or idiosyncratic

interpretations.'" *Id.* (quoting *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354–55 (3d Cir. 2000)). And even the courts that have adopted the unsophisticated-consumer test (rather than the least-sophisticated-consumer test) have acknowledged that the difference between the two formulations is merely one of "[l]abels," *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 n.4 (1st Cir. 2014), with no "practical difference in application," *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 1996); *see also Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1061 n.2 (9th Cir. 2011) (noting that the two tests differ "only in semantics").

Once the semantics are set aside, the petitioners' position is exposed as nothing more than a factbound, case-specific plea for this Court to address an alleged "misapplication of a properly stated rule of law." Sup. Ct. R. 10. Had that been made clear in the petition, this Court may well have denied review on the second question. But as it is, the Court should make clear (if it reaches the issue) that liability under the FDCPA is assessed from the standpoint of the "unsophisticated" or "least sophisticated" consumer—not the average consumer.

B. For more than 30 years, the lower courts have consistently held that the relevant standard under the FDCPA takes the perspective of an unsophisticated or least-sophisticated consumer. *See Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985). This standard "protects all consumers, the gullible as well as the shrewd the ignorant, the unthinking and the credulous." *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1171 (9th Cir. 2006). It "does not rely on assumptions about the 'average' or 'normal' consumer." *Clomon*, 988 F.2d at 1319.

Today, that is the rule in every circuit.[2] And for good reason: When Congress enacted the FDCPA, it did so because it found that "[e]xisting laws and procedures" were "inadequate to protect consumers." 15 U.S.C. § 1692(b). As the Eleventh Circuit long ago explained, "[i]t would be anomalous for the Congress, in light of its belief that existing state and federal law was inadequate to protect consumers, to have intended that the legal standard under the FDCPA be *less* protective of consumers than under the existing 'inadequate' legislation." *Jeter*, 760 F.2d at 1173–74 (emphasis in original). Despite multiple amendments to the FDCPA over the last few decades, Congress has never acted to disturb this bedrock rule. This Court should not do so either.

The prevailing standard has not only proved workable over time but also reflects contemporary realities. Nearly half of American consumers read at no more than an eighth-grade level. Gov't Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosure to Consumers*,

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[2] Most circuits use the "least sophisticated consumer" language. *See, e.g.*, *Clomon*, 988 F.2d at 1318–19 (2d Cir.); *Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 298 (3d Cir. 2008); *United States v. Nat'l Fin. Servs., Inc.*, 98 F.3d 131, 136–37 (4th Cir. 1996); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1236 (5th Cir. 1997); *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1028 (6th Cir. 1992); *Clark*, 460 F.3d at 1171 (9th Cir.); *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1193 (11th Cir. 2010). The First, Seventh, and Eighth Circuits use the "unsophisticated consumer" language. *Pollard*, 766 F.3d at 103–04 (1st Cir.); *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1257 (7th Cir. 1994); *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051, 1055 (8th Cir. 2002). However labeled, these standards are "designed to protect consumers of below average sophistication or intelligence," while still "contain[ing] an objective element of reasonableness." *Peters*, 277 F.3d 1051 at 1055.

GAO-06-929, at 38 (2006); *see also* Lowenstein, Sunstein & Golman, *Disclosure: Psychology Changes Everything*, Annual Rev. of Econ. 21–29 (Harvard Pub. Law Working Paper No. 13-30 Aug. 18, 2013). And "research measuring the literacy of the U.S. population demonstrates that even consumers who might take the time and trouble to 'read' contemporary consumer contract documents are unlikely to understand them." White & Mansfield, *Literacy and Contract*, 13 Stan. L. & Pol'y Rev. 233, 234 (2002). Indeed, some studies have found that "about half of the American adult population could not be expected to consistently extract information from lists, forms, tables, and similar documents [that] are less complex than many modern consumer contract forms." *Id.* at 237.

These basic deficiencies are magnified in the consumer-finance context, because "[t]he evidence indicates that financial literacy levels among U.S. consumers are low." Boedecker & Lucas, *Consumer Behavior and the Regulation of Consumer Financial Services*, Economics, Law, and International Business, Paper 2 (2009), http://repository.usfca.edu/elib/2/, at 20.[3] A National Bureau of Economic Research study, for example, found "strikingly low levels of debt literacy across the U.S. population"; only one-third of respondents could answer basic questions measuring financial knowledge related to debt. Lusardi & Tufano, *Debt Literacy, Financial Experiences, and Overindebtedness*, Nat'l Bureau of Econ.

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[3] *See also* Dinwoodie, *Ignorance Is Not Bliss: Financial Illiteracy, the Mortgage Market Collapse, and the Global Economic Crisis*, 18 U. Miami Bus. L. Rev. 181, 184–85 (2010); Lusardi & Mitchell, *Financial Literacy and Retirement Preparedness: Evidence and Implications for Financial Education*, 42 Bus. Econ. 35, 36–37 (Jan. 2007) ("[A]ctual financial knowledge was sorely deficient for both high school students and working-age adults.").

Res. (March 2009), http://www.nber.org/papers/w14808, at 1, 5–8. Yet many groups, "like the elderly, *think* they know considerably more than they actually do," which "may help explain the incidence of financial frauds perpetuated against [them]." *Id.* at 24. The evidence, the authors concluded, "provides some reason for concern in an economy in which consumers routinely borrow and save using debt-like instruments." *Id.* at 8.

In light of this empirical evidence, the Court should refrain from disturbing the settled consensus on the least-sophisticated-consumer standard. When it enacted the FDCPA, Congress was aware that private debt collectors—who are typically paid on commission—have every incentive to exploit consumers' deficiencies by "press[ing] the boundaries of the Act's prohibitions on collection techniques." *Jerman*, 559 U.S. at 602; *see also* S. Rep. No. 95–382, at 2. Departing from the standard that has prevailed for the last 30 years, as the petitioners propose, would only encourage debt collectors to press those boundaries further still—the very opposite of what Congress intended.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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